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IN THE

Supreme Court of the United States

October Term, 1955.

No. 1001136

ARTHUR MUNGIOLE,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.

Martin & Lyle, 1103 Bankers Securities Bldg., Phila. 7, Pa.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

ARTHUR MUNGIOLE, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 10, 1956.

OPINIONS BELOW.

The opinion of the court below (*infra*, Appendix A, pp. 13-15) has not yet been reported. The opinion of the district court overruling petitioner's motion to dismiss is reported at 125 F. Supp. 32. The opinion of the district court denying petitioner's motion for a judgment of acquittal (R. 9a-15a) is reported at 131 F. Supp. 150.

JURISDICTION.

The judgment of the court below (*infra*, Appendix B, p. 16) was entered on May 10, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTIONS PRESENTED.

1. Whether a person can be convicted under §3294(a) of the Internal Revenue Code of 1939 for wagering without paying the wagering tax, where it is shown that the Collector refused payment of the tax unless there was also furnished the information called for on Form 11-C.

2. Whether, under a regulation permitting a person to receive wagers so long as the tax thereon is paid by the end of the month in which the wagering begins, a requirement that the person furnish the information called for on Form 11-C at the time the tax is paid, subsequent to the wagering, improperly violates his privilege against self-incrimination.

3. Whether the doctrine of *United States v. Kahriger*, 345 U. S. 32, should be reexamined in the light of the circumstances in which the wagering tax is now actually enforced.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED.

1. The Fifth Amendment provides, *inter alia*, that ——

> "No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; * * *."

2. Section 3285 of the Internal Revenue Code of 1939 provides in pertinent part as follows:

> **"§3285. Tax.**
>
> **"(a) Wagers.** There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.
>
> * * * * * * * *
>
> **"(d) Persons liable for tax.** Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery."

3. Section 3290 of the Internal Revenue Code of 1939 provides as follows:

> **"§3290. Tax.**
>
> "A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A

[§§3285-3287] or who is engaged in receiving wagers for or on behalf of any person so liable."

4. Section 3294(a) of the Internal Revenue Code of 1939 provides as follows:

> **"§3294. Penalties.**
>
> **"(a) Failure to pay tax.** Any person who does any act which makes him liable for special tax under this subchapter, without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000."

5. 26 CFR §325.50, 16 Fed. Reg. 11218, in effect until September 1, 1952, provided in pertinent part as follows:

> "§325.50 *Registry, return, and payment of tax.* (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code * * * and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. * * * The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein."

STATEMENT.

An information was filed against petitioner for violation of §3294(a) of the Internal Revenue Code of 1939 as amended,[1] in that, on or about April 1, 1952, being a

[1] Throughout this petition, all references are to the Internal Revenue Code of 1939, as amended, 26 U. S. C. (1952 ed.), which was in force at all times here pertinent.

person liable for the payment of the wagering tax imposed by §3290, did accept wagers as defined in §3285, "without having paid the Special Occupational Tax"—i. e., the wagering tax—"imposed by Section 3290 due and owing to the United States on or before 30th day of April, 1952."

After a motion to dismiss the information had been denied (125 F. Supp. 32), petitioner and defendant stipulated the following facts (R. 3a-4a):

> "That the defendant on or about April 1, 1952, at Philadelphia, in the Eastern District of Pennsylvania, within the jurisdiction of this Court, did accept wagers as defined in Title 26 USC Section 3285, and that he did not pay the special occupational tax imposed by Section 3290 that was due to the United States of America on or before the 30th day of April, 1952;
>
> "That the sections contained in Paragraph 4 of Form 11-C then in effect state as follows:
>
> " 'The information called for on the return must be completely furnished. If not so furnished the special tax stamp will not be issued.'
>
> "That in March of 1953 said form was amended, whereby the requirements quoted were eliminated;
>
> "That the reason the defendant did not pay the tax was because the then Collector of Internal Revenue would not accept payment for this tax unless the defendant furnished completely the information as required, which defendant refused to do on the ground it would tend to incriminate him in a federal offense;
>
> "That the defendant had been convicted of state gambling offenses prior to April 1, 1952; to wit, on March 7, 1937; September 22, 1937; and November 15, 1945."

The only other evidence introduced was the form referred to in the stipulation, Form 11-C (R. 7a-8a), which stated at the foot of the face thereof (R. 7a),

> "This return must be filed with the Collector of Internal Revenue for your district * * *, accompanied by remittance, on or before the last day of the month in which liability is incurred in order to avoid penalties."

Par. 3 of the instructions on the reverse of Form 11-C (R. 8a) provided in part,

> "If the return is not filed with the collector during the month in which liability began, the penalty prescribed by section 3612(d) of the Internal Revenue Code, may be incurred."

At the time of the offense alleged, and until September 1, 1952, 26 CFR §325.50(a), 16 Fed. Reg. 11218, provided in pertinent part:

> "§325.50. *Registry, return, and payment of tax.* (a) Every person engaging in the business of accepting wagers and liable to the 10 percent excise tax imposed by section 3285 of the Internal Revenue Code * * * and every person engaged in receiving wagers for or on behalf of any person so liable shall on or before the last day of the month in which business is commenced file a return on Form 11-C. * * * The collector, upon request, will furnish to the taxpayer the proper forms which shall be filled out and signed as indicated therein."[2]

The district court denied the petitioner's motion for a judgment of acquittal (R. 9a-15a; 131 F. Supp. 150), and sentenced him to pay a fine of $1000 (R. 15a), allowing bail pending appeal (R. 16a).

On appeal, the court below affirmed (Appendix A, *infra*, pp. 13-15). It held that "There is not an iota of evidence

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[2] Thereafter, effective September 1, 1952, this regulation was amended so as to require the filing of the return and the payment of the special tax prior to engaging in the business of accepting wagers. See 17 Fed. Reg. 6732, and pp. 7, 8, **infra.**

in the record as to when Mungiole attempted to pay the tax, or as to the amount of money, if any, he tendered to the Collector for the payment of the tax." The court rejected petitioner's defense that the furnishing of the information required by Form 11-C would tend to incriminate him, saying,

> "In the instant case Mungiole may have tendered payment of the tax before accepting wagers, in which event his claim of the privilege against self-incrimination would be totally lacking in substance. We cannot assume in the absence of any evidence that Mungiole followed a contrary course of action. He has not brought forward facts by which his claim of self-incrimination can be supported."

REASONS FOR GRANTING THE WRIT.

By ignoring a controlling regulation that completely transforms the nature of the offense of which petitioner was convicted, the court below has raised, within the compass of the present narrow record, grave questions of constitutional law that call for review here.

First. Contrary to the assumptions made below, §3290 (*supra*, p. 3), which required payment of the wagering tax, was not prospective in operation at the time petitioner was charged with its violation. At all times here material, Regulations 132, Miscellaneous Excise Taxes, provided in 26 CFR §325.50(a) that "Every person engaging in the business of accepting wagers * * * shall on or before the last day of the month in which business is commenced file a return on Form 11-C" (16 Fed. Reg. 11218). Not until September 1, 1952, did this regulation require the payment of the wagering tax prior to engaging in the business of accepting wagers. See 26 CFR §325.50(a), as amended July 23, 1952

(17 Fed. Reg. 6732; see p. 6733 for the effective date). The statement in *Lewis v. United States*, 348 U. S. 418, 422, that "The Act is wholly prospective", and the similar statement in *United States v. Kahriger*, 345 U. S. 32-33, while correct at the time those opinions were written, is plainly not applicable in this case, where the offense was alleged to have taken place prior to September 1, 1952.

Here petitioner was accused (R. 2a) of accepting wagers on April 1, 1952, without having paid the wagering tax due on or before April 30, 1952. He was not charged with failure to register. But it was stipulated that the only reason he did not pay the tax was because the then Collector would not accept payment unless petitioner furnished the information called for on Form 11-C, which petitioner refused to do because to do so would tend to incriminate him in a federal offense (R. 4a). Thus petitioner was found guilty by the trier of facts (R. 15a), not of gambling without paying the tax, but of gambling without registering, which is a wholly different matter. Thus there was violated "The rule that a man shall not be charged with one crime and convicted of another." *Schooner Hoppet v. United States*, 7 Cranch 389, 394; *Cole v. Arkansas*, 333 U. S. 196.

The court below (Appendix A, *infra*, pp. 13-15) affirmed the conviction on the footing that petitioner did not show when he tendered the tax or how much he offered to pay. This was a point not mentioned by the trier of facts, and was raised only by the appellate court after the case had been under advisement there for seven months.[3] The trial court had said that: "The issue is whether the defendant had a right to refuse to answer the questions set out in the Application for Registry on the ground that such answers might tend to incriminate him of a federal crime" (R. 9a, 10a). Thus the court below has improperly shifted the burden of proof to the defendant in a criminal case. Plainly,

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[3] Argued October 7, 1955, decided May 10, 1956 (Appendix A, **infra**, p. 13).

to the extent that the proof left the matter uncertain, the prosecution has not proved its case against petitioner beyond a reasonable doubt.

Second. Petitioner has been convicted of engaging in wagering without paying the tax but only because he refused to incriminate himself. Thus the case falls squarely within *United States v. Sullivan,* 274 U. S. 259.

There a person who derived the bulk of his income from violations of the National Prohibition Act was convicted of wilfully refusing to file an income tax return. He defended on the ground that the filing of such a return would require him to incriminate himself. This Court, speaking through Mr. Justice Holmes, said (274 U. S. at 263):

> "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all."

Petitioner here did everything that Sullivan was told by this Court to do. But the Collector refused to receive the tax unless petitioner went on to incriminate himself (R. 4a).

Third. Petitioner's fear was not imaginary. See trial court's opinion (R. 10a, 11a). Since 26 CFR §325.50(a) then in force permitted him to accept wagers throughout the month of April 1952 so long as he paid the tax by the last day of the month, full reply to the questions required to have been answered would necessarily have involved incrimination, as it was only stipulated that wagers had been received on or about April 1 (R. 3a). And, to the extent that the requirement was prospective, the furnishing of the information would have supplied leads for prosecution in the future. Cf. *Hoffman v. United States,* 341 U. S. 479, 486, 487; *Emspak v. United States,* 349 U. S. 190, 198-201. And see *United States v. Ginn,* 222 F. 2d 289, 291, where the court

below refused to construe the alien registration provisions so as to expose an alien, upon registration, to prosecution for either past or future offenses.

Fourth. Petitioner's fears, it needs to be emphasized, were very real. He had already been convicted of three state gambling offenses (R. 4a). And under the federal statute, any gambling whatever by one who has not paid the federal tax becomes a federal offense, so that, in fact, violations of state laws against gambling are now prosecuted by the United States Attorney. That statement is not hyperbole; it is fully documented by *Daley v. United States*, 231 F. 2d 123 (C. A. 1), pending on petition for certiorari, No. 876, this Term.

Fifth. The truly disturbing feature of the present case is that it confirms, in a case that went to trial, the fears expressed in *United States v. Kahriger*, 345 U. S. 32: It shows that the Internal Revenue Service, far from keeping the cash and letting the credit go, is interested only in having gamblers incriminate themselves even at the expense of the federal fisc. So far as counsel is aware, this is the first instance an individual has been convicted for not paying a tax where payment was not accepted because he refused as a condition of payment to incriminate himself. Although "there is no constitutional right to gamble" or to sell tobacco or cheese, the Government by regulation could not *here* refuse to accept payment and yet properly *criminally* prosecute for failure to pay the tax. Thus there is presented a case which assuredly warrants review by this Court, and which strongly suggests as well that it may be appropriate to reexamine what was decided, on motion to dismiss, in *United States v. Kahriger*, 345 U. S. 32. Now that the actual operation of the statute there considered *in vacuo* has become apparent, the time seems ripe for an appeal from judgment by speculation to judgment by experience.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

June, 1956.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.,
Counsel for the Petitioner.